SUPREME COURT, U. S.

Supreme Court, U.S.
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No. 71-698

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES O. EVANS, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (Pet. App. 1-7) is reported at 446 F. 2d 821.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1971, and a timely petition for rehearing was denied on September 2, 1971. The petition for a writ of certiorari was filed on November 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the identity of an informant, who supplied the Federal Aviation Administration with information about behavior disorder and mental abnormality of a certified commercial pilot, was exempt from disclosure to the pilot and public under the Freedom of Information Act by virtue of Section 1104 of the Federal Aviation Act of 1958.

2. Whether such information was also exempt from disclosure under the Freedom of Information Act by virtue of the Act's exemption of investigatory files.

STATUTES INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides:

> § 552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records

and to order the production of any agency records improperly withheld from the complaint. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

* * * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

* * * * *

2. Section 1104 of the Federal Aviation Act of 1958, 49 U.S.C. 1504, provides:

Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of

this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided*, That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

STATEMENT

In October of 1960, as a result of certain letters received alleging behavior disorder and mental abnormality of petitioner, a commercial airline pilot, the Federal Aviation Administration ("FAA") suspended petitioner's medical certificate and required him to undergo psychiatric testing (Pet. App. 2). Upon the completion of the tests, petitioner's medical certificate was restored (*ibid*).

Petitioner filed this action under the Freedom of Information Act, 5 U.S.C. 552, to obtain from the FAA the letters which it had received (App. 1–5, 13–16).[1] Petitioner alleged that he had been discharged by Pan American World Airways on April 15, 1960. He alleged in essence that the damaging letters had been written to

[1] "App." refers to the Appendix to Briefs, which, together with the Record on Appeal, has been filed with the Clerk of this Court.

the FAA by some unknown officials of Pan Am in October of 1960 in order to engineer his medical suspension, which they then called to the attention of the arbitrator hearing petitioner's wrongful discharge claim (App. 1–3).

According to an affidavit opposing disclosure filed in this case by John H. Shaffer, Administrator of the FAA, the letters sought by the petitioner had been furnished to the FAA only after the informant had been assured that "how we obtained this information will not, in any way, be made available to the pilot" (App. 14–15). The Administrator stated that the letters were "furnished and accepted in confidence by the agency" and "led to a complete investigation, instituted by the agency, into the qualifications of the plaintiff to hold a pilot certificate" (App. 15). The Administrator also stated that the letters "were made part of that investigatory file compiled by this agency for law enforcement purposes in the enforcement of its regulations" (App. 15–16). Finally, the Administrator stated, in accordance with Section 1104 of the Federal Aviation Act, 49 U.S.C. 1504 (*supra*, p. 3), that disclosure of the letters "would adversely affect the interest of the writer of the letters and is not required in the interest of the public" (App. 13–14).

After an *in camera* inspection of the informant's letters, the district court granted summary judgment dismissing the action. The court ruled that the letters were exempted from disclosure under the Information Act as material exempted from disclosure by statute and as investigatory files (5 U.S.C. 552(b) (3) and

(7), *supra*, pp. 2–3) (Pet. App. 13–14). The court of appeals, after an *in camera* inspection of its own, unanimously affirmed on the same grounds (Pet. App. 1–7).

ARGUMENT

1. The court of appeals correctly held that the informant's letters were exempt from disclosure under the Act's exemption of matters "specifically exempted from disclosure by statute" (5 U.S.C. 552(b)(3)).[2] 49 U.S.C. 1504 provides such a specific exemption:

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[2] In explaining this exemption, the House Committee on Government Operations noted that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160" (H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10 (1966)). The Attorney General noted that a survey conducted by the Administrative Conference of the United States in 1962 "concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, * * * or otherwise protect from disclosure. The reference [in the House Report] therefore indicates an intention to preserve whatever protection is afforded under other statutes, whatever their terms." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), pp. 31–32. Accord: *Freedom of Information: The Statute and the Regulations*, 56 Geo. L.J. 18, 33–34 (1967). See also the statement of Senator Long, Chairman of the Senate Judiciary Committee's Subcommittee on Administrative Practice and Procedure: "It should be made clear that this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information as a supplement necessary to the proper functioning of certain agencies." Hearings on S. 1666 and S. 1663 (in part), Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, 88th Cong., 1st Sess. (October 28, 1963), p. 6.

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. * * *

As the court of appeals stated (Pet. App. 7): "Before he would name the pilot in question, the letter writer required assurances of complete non-disclosure. The assurances were given. This was a running, permanent objection to the disclosure of the writer's identity and is within the provisions of Section 1504."

Petitioner contends (Pet. 16) that the FAA Administrator erred in concluding that disclosure of the letters would "adversely affect the interests" of the informant and that disclosure "is not required in the interest of the public". But the interests of the informant obviously would be adversely affected if his identity were to be disclosed to the pilot whom the informant caused to be subjected to official agency investigation into the pilot's qualifications to fly. Further, the public interest would be adversely affected since many people would be reluctant, or unwilling, to furnish the FAA with information if the agency could not honor its assur-

ances of confidential treatment. As the court of appeals stated (Pet. App. 5):

> We are * * * well aware of the critical importance of requiring that commercial airplanes be flown only by pilots who are in good health, both mentally and physically. Furthermore, the protection of the safety of the traveling public in this regard is entrusted by law to the Federal Aviation Agency. As a matter of common sense the efforts of this Agency to investigate and take appropriate action as to the mental and physical health of pilots would be seriously jeopardized if individuals could not confidentially call facts to the attention of the Agency which might affect the safety and lives of millions of passengers.[3]

2. The court of appeals also correctly held that the informant's letters fall within the exemption from disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency".[4] 5 U.S.C.

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[3] There is nothing in the record to support petitioner's assertions that (*e.g.*, Pet. 7) his "discharge was sustained and Evans career as a pilot was ruined." According to the deposition of Mr. Schy, petitioner's attorney in the arbitration proceeding, the arbitrator found that Pan Am's charges were not "precise" and ordered Pan Am to file precise charges within a given time (Record on Appeal, Document No. 8, p. 24). Mr. Schy also stated that the arbitration award made no provision for the year in which petitioner's arbitration proceeding had been pending (*ibid.*).

[4] The exception to the exemption is not relevant here; it was merely designed to insure that private parties to whom material in an investigative file is available "by law" do not lose that entitlement by virtue of the exemption. Thus, for ex-

552(b)(7). As the court noted (Pet. App. 5), Congress enacted this exemption for the specific purpose, among others, of protecting the identity of informants. See 110 Cong. Rec. 17667–17668 (1964); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., on S. 1663 (1964), pp. 103, 212, 389, 493, 679. Moreover, as the court further noted, "Congress could not possibly have intended"—as petitioner contends (Pet. 14)—that informants' letters "should be disclosed once an investigation is completed" (Pet. App. 5). Under petitioner's theory FBI files would no longer be exempt after the FBI investigation was completed, even though Congress intended to protect FBI files from disclosure. H. Rep. No. 1497, 89th Cong., 2d Sess., p. 2 (1966); S. Rep. No. 813, 89th Cong., 1st Sess., p. 3 (1965).

3. The court of appeals' alternative holding—that the "investigatory files" exemption covers an informant's letters after the close of the investigation—is not in conflict with the decision of any other court.[5] None of the

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ample, a defendant who is entitled under the Jencks Act to see an FBI report, does not lose that entitlement by virtue of the "investigatory files" exemption. See 110 Cong. Rec. 17667 (1964); *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), p. 38; *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 593–594 (D. P.R.).

[5] *Wellford* v. *Hardin*, 444 F. 2d 21 (C.A. 4), held this exemption inapplicable to Department of Agriculture warning letters and reports of detention, which constituted "the written records of regulatory action already taken." 444 F. 2d at 24. *Bristol-Myers* v. *Federal Trade Commission*, 424 F. 2d 935

cases petitioner cited involved any question of the disclosure of the statements by or the identity of an informant.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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(C.A. D.C.), held that an agency could not protect all its files by the simple expedient of labeling them "investigatory" with a suggestion that enforcement proceedings might be commenced at some unspecified future time (424 F. 2d at 939). *Getman* v. *National Labor Relations Board*, 40 U.S. Law Week 2126 (C.A.D.C.) (Pet. 15) held that the "investigatory files" exemption did not cover lists of employees eligible to vote in labor representation elections since the lists were not compiled for "law enforcement" purposes. *Cooney* v. *Sun Shipbuilding & Drydock Company*, 288 F. Supp. 708 (E.D. Pa.) (Pet. 14) held that the exemption covered statements of witnesses obtained during a government investigation.

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